No. 10709

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARVIN S. NICHOLS,

Appellant,

vs.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

BERNARD L. SWERLAND,

Old National Bank Building
Spokane, Washington

Attorney for the Appellant

EDGE, DAVENPORT, KEITH & dePENDER,

Paulsen Building,
Spokane, Washington

Attorneys for the Appellee

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 296

MARVIN S. NICHOLS,

Plaintiff,

vs.

J. J. NEWBERRY COMPANY,

Defendant.

AMENDED COMPLAINT

Plaintiff, complaining of the defendant, alleges, as follows:

I.

That plaintiff is, and at all times hereinafter mentioned, has been a resident of Spokane County, State of Washington.

II.

That at all the times hereinafter mentioned the defendant J. J. Newberry Company was and is a foreign corporation doing business in the city of Spokane, Washington, and engaged in the operation of a department store at premises located at 620 Riverside Avenue in the City of Spokane.

III.

That in or about the Spring of 1941 and continuing to the first day of September, 1942, the defendant did, with the intention and design to injure, disgrace and defame this plaintiff, and to bring him into public discredit and obloquy, falsely and mali-

ciously compose, utter and publish, of and concerning the plaintiff, a false, scandalous, malicious, and defamatory libel consisting of a photograph and representation of the said plaintiff in which said libel and photograph the plaintiff is clearly marked and pointed out as a "check artist". That upon said photograph were contained certain identifying numerals such as are customarily placed upon photographs of persons with criminal records by law enforcement agencies. That the said libel and photograph was included in other photographs of [1*] persons having criminal records and of unsavory reputations. That the defendant did cause the said libel and photograph to be placed in its premises located at 620 Riverside Avenue in the City of Spokane and widely disseminated and published, with actual malice, and wrongful and willful intent to injure plaintiff.

IV.

That by the foregoing false, malicious and defamatory picture and publication, the defendant intended to convey the meaning, and the said photograph and picture was by the persons who observed the same in the premises of the defendant J. J. Newberry Company understood and believed to convey the meaning that plaintiff was a passer and forger of bad checks and a criminal, and that plaintiff had been guilty of a crime. That said publication was false, malicious and defamatory, and plaintiff was not and never has been guilty of passing or forging

*Page numbering appearing at foot of page of original certified Transcript of Record.

checks, or of criminal conduct or fraud and never had been convicted or guilty of any crime whatever.

V.

That by reason of the aforesaid a great number of persons in the premises of the defendant saw said photograph and picture, and plaintiff has suffered pain and mental anguish and has been greatly injured, and has suffered in his good name and reputation and character, and has been and is brought into public scandal, and infamy and disgrace amongst the good citizens of his community to plaintiff's damage in the sum of Fifty Thousand ($50,000) dollars, no part of which has been paid.

Wherefore plaintiff demands judgment against the defendant in the sum of Fifty thousand ($50,000) Dollars, in addition to the costs and disbursements of this action, and such other and further relief as to the Court may seem just and proper.

BERNARD L. SWERLAND
Attorney for Plaintiff [2]

State of Washington,
County of Spokane—ss.

Marvin S. Nichols, being first duly sworn upon his oath deposes and says: that he is the plaintiff in the above entitled action; that he has read the above and foregoing Amended Complaint, knows the contents thereof, and that the same are true as he verily believes.

MARVIN S. NICHOLS

Subscribed and sworn to before me this 17th day of February, 1943.

(Seal) MICHAEL J. KERLEY

Notary Public in and for the State of Washington, residing at Spokane.

Copy received this 25th day of Feb. 1943.

EDGE

Attorney for deft.

[Endorsed]: Filed Feb. 26, 1943. [3]

[Title of District Court and Cause.

MOTION FOR ORDER GRANTING LEAVE TO AMEND RECORD AS TO DIVERSITY OF CITIZENSHIP

Comes now the above named plaintiff and respectfully moves the Court for an Order granting leave to the plaintiff to amend the Amended Complaint and record as follows:

I.

"That plaintiff is, and at all times hereinafter mentioned, has been a citizen of the State of Washington and a resident of Spokane County, State of Washington."

This Motion is based upon the records and files herein, the affidavits of Bernard L. Swerland and Marvin S. Nichols, annexed hereto and upon Title

28, United States Code Section 399, Rule 75 of the Rules of Civil Procedure.

BERNARD L. SWERLAND
Attorney for Plaintiff

Copy received this 6th day of March, 1944.
LESTER EDGE
Attorney for defendant

[Endorsed]: Filed Mar. 8, 1944. [4]

[Title of District Court and Cause.

AFFIDAVIT IN SUPPORT OF APPLICATION TO AMEND

State of Washington,
County of Spokane—ss.

Marvin S. Nichols, being first duly sworn on his oath says: that he is the plaintiff in the above entitled action and resides with his family at 614 East Broad, in the City of Spokane, Washington, and respectfully submits this affidavit in support of an application to amend the amended complaint and record herein to indicate the citizenship of deponent, which in fact existed at the time of the commencement of this action.

That deponent was born in Marsburg, Pennsylvania, on November 16, 1900, and is and has been since a citizen of the United States of America; that in 1937 deponent and his family settled in the City of Spokane, State of Washington, wherein he has been permanently domiciled ever since; that de-

ponent has voted in the City of Spokane, State of Washington, and presently is and has been since 1937 a citizen of the State of Washington and the United States of America.

MARVIN S. NICHOLS

Subscribed and sworn to before me this 6th day of March, 1944.

(Seal) MICHAEL J. KERLEY

Notary Public in and for the State of Washington, residing at Spokane [5]

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD L. SWERLAND

State of Washington,
County of Spokane—ss.

Bernard L. Swerland, being first duly sworn on oath deposes and says: that he is the attorney for the plaintiff in the above entitled action; that he respectfully submits the within Affidavit in support of an application to amend the Amended Complaint and the record as to the diversity of citizenship of the parties therein. Deponent respectfully submits, as appears from the record of the trial of this case and the affidavit of Marvin S. Nichols, hereto annexed, that the said plaintiff is a citizen of the United States of America and of the State of Washington, and was a citizen at the time of the commencement of the above entitled action. That although plaintiff was in fact a citizen of the State of Wash-

ington the Amended Complaint defectively alleged his citizenship. Deponent therefore respectfully prays for leave to amend the Amended Complaint of plaintiff and the record herein so as to properly allege the diversity of citizenship which in fact existed, in accordance with Title 28, U. S. Code Section 399.

BERNARD L. SWERLAND

Subscribed and sworn to before me this 6th day of March, 1944.

(Seal) MICHAEL J. KERLEY

Notary Public in and for the State of Washington, residing at Spokane [6]

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO PLAINTIFF TO AMEND RECORD AND AMENDED COMPLAINT AS TO DIVERSITY OF CITIZENSHIP

Plaintiff having filed his Motion praying for an Order granting leave to amend the record and Amended Complaint, as to the diversity of citizenship, and the said Motion having come on regularly for hearing before the Court, and the Court being fully advised in the premises, and due deliberation having been had;

It Is By the Court Ordered: That the said Motion shall be, and the same is hereby in all respects granted, and the Amended Complaint and record

of the trial of the above entitled action is amended by indicating that the plaintiff is a citizen and resident of the State of Washington.

Done in open Court this 8th day of March, 1944.

L. B. SCHWELLENBACH
U. S. District Judge

Presented by
BERNARD L. SWERLAND

Copy received and foregoing Order is consented to
LESTER EDGE
one of the
Attorneys for Defendant

[Endorsed]: Filed March 8, 1944. [7]

[Title of District Court and Cause.]

ANSWER

The defendant for answer to the amended complaint of plaintiff herein admits, denies and alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph I of said amended complaint.

II.

Defendant admits the first four lines of Paragraph II of said amended complaint.

III.

Defendant denies, "That in or about the spring of 1941 and continuing to the first day of September, 1942, the defendant did, with the intention and design to injure, disgrace and defame this plaintiff, and to bring him into public discredit and obloquy, falsely and maliciously compose, utter and publish, of and concerning the plaintiff, a false, scandalous, malicious, and defamatory libel consisting of a photograph and representation of the said plaintiff in which said libel and photograph the plaintiff is clearly marked and pointed out as a 'check artist'."

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment in said Paragraph III, "That upon said photograph were contained certain identifying numerals such as are customarily placed upon photographs of persons [8] with criminal records by law enforcement agencies. That the said libel and photograph was included in other photographs of persons having criminal records and of unsavory reputations."

Defendant denies, "That the defendant did cause the said libel and photograph to be placed in its premises located at 620 Riverside Avenue in the City of Spokane and widely disseminated and published, with actual malice, and wrongful and willful intent to injure plaintiff."

IV.

Answering Paragraph IV, defendant denies, "That by the foregoing false, malicious and defamatory picture and publication, the defendant intended to convey the meaning, and the said photograph and

picture was by the persons who observed the same in the premises of the defendant J. J. Newberry Company understood and believed to convey the meaning that plaintiff was a passer and forger of bad checks and a criminal, and that plaintiff had been guilty of a crime."

Defendant denies, "That said publication was false, malicious and defamatory."

As to the allegation, "And plaintiff was not an never has been guilty of passing or forging checks, or of criminal conduct or fraud and never had been convicted or guilty of any crime what ever," defendant is without knowledge or information sufficient to form a belief.

V.

Answering Paragraph V, defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of said amended complaint.

Defendant denies that plaintiff has been damaged in the sum of Fifty Thousand ($50,000.00) Dollars, or in any other sum by reason of any acts of this defendant. [9]

Wherefore, defendant having fully answered prays plaintiff take nothing by this action; that the same be dismissed; and that it recover its costs and disbursements herein expended.

EDGE, DAVENPORT, KEITH
& dePENDER
By LESTER EDGE
Attorneys for Defendant.

Received copy hereof this 21 day of April, 1943.
B. L. SWERLAND
Atty for Plaintiff

[Endorsed]: Filed April 23, 1943. [10]

[Title of District Court and Cause.]

NOTICE OF TRIAL AMENDMENT

To the Plaintiff and To Bernard L. Swerland, his attorney:

Please take notice that at the opening of the trial in the above-entitled action the defendant will move the court for leave to amend its answer herein by adding the following affirmative defenses:

For a first affirmative defense defendant alleges:

The Police Department of the City of Spokane furnished to defendant the photograph complained of as being the photograph of one who had passed worthless or questionable checks. Defendant relied on the representations of the Police Department, and any communication of said photograph by defendant was made in good faith and without malice.

[Marginal Note]: Stricken by Court

For a second affirmative defense defendant alleges:

Defendant conducts a retail variety store in the City of Spokane. Customers frequently tender checks to defendant's employees in payment of purchases, and defendant has suffered losses from cashing checks which have been forged, or which have been drawn against accounts in which the maker

had no funds or insufficient funds. The Police Department of the City of Spokane furnished to the Retail Trade Bureau, an organization of merchants, photographs of persons who had been found to have passed worthless or questionable checks, so that the photographs could be shown to the employees of retail stores, in order to prevent the acceptance of such checks. Any photographs posted by defendant were furnished in the manner and for the purpose aforesaid by the Police Department of the City of Spokane, and if defendant published plaintiff's photograph, such publication was made only to defendant's employees for the purpose, in good faith, of preventing acceptance of worthless or questionable checks in defendant's store, and was privileged.

EDGE, DAVENPORT, KEITH
& dePENDER
LESTER P. EDGE,
Attorneys for Defendant,
909 Paulsen Building,
Spokane, Washington.

Received Copy Hereof This 15th day of June, 1943.

BERNARD L. SWERLAND,
Atty. for Pltff.

[Endorsed]: Filed June 16, 1943. [11]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10709

MARVIN S. NICHOLS,

Appellant,

vs.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

Date: June 21st, 1943

At Spokane, Washington

Before Hon. L. B. Schwellenbach, Judge and a Jury.

Appearances:

For the Plaintiff:
Mr. Bernard L. Swerland

For the Defendant:
Edge, Davenport, Keith, & dePender

STATEMENT OF FACTS [12]

The above entitled cause coming on for hearing and for trial before the Honorable L. B. Schwellenbach, Judge, and a Jury duly empanelled and sworn to try the same, and said Jury having been duly empanelled and sworn, the following proceedings were had, testimony taken and exhibits introduced:

Mr. Swerland: Your Honor, at this time we think we should read into the record——

The Court: Let the record show that the defendant filed notice of trial amendment which consisted of a first and second affirmative defenses. There are no objections raised by the plaintiff to the filing of the amendment but the plaintiff moved to strike both of the defenses, and the Court granted plaintiff's motion to strike the first affirmative defense and denied the plaintiff's motion to strike the second affirmative defense. That the basis for striking the first affirmative defense is that all matters therein contained are also contained in the second affirmative defense. The plaintiff having had no opportunity to file a formal written reply to the affirmative defenses, permission is now granted for the plaintiff to enter a reply orally. You may do that now, Mr. Swerland.

Mr. Swerland: As and for a reply to the affirmative defense interposed by defendant the plaintiff denies each and every allegation, matter and thing contained therein. [15]

TESTIMONY OF WITNESSES IN NARRATIVE FORM IN ORDER OF THEIR APPEARANCE

JEAN PIERCE

called on behalf of plaintiff.

This witness testified she was in the employ of the defendant company from September 1940 to December 1941 as a sales girl. She started in the oilcloth department, then had the dress department, then the lingerie department. She further testified she wrapped packages, waited on trade and would receive payment for the merchandise from the customers but that if any checks were presented by customers they were to be taken to the cashier's cage to be cashed as the sales girls handled no checks at all.

The witness further testified that she saw a picture of the plaintiff on a bulletin board placed in the restroom for the girl employees. That the title "Check artists" was above the picture of plaintiff.

(Testimony of Jean Pierce.)

The restroom was located on the second floor of the store, was a large room with tables and chairs and couch and contained a lavatory. That the bulletin board to which the picture was attached was affixed permanently to the wall by nails. That she knew the plaintiff and recognized the photograph as his picture.

Plaintiff's Exhibit "A", consisting of a group of photographs, was shown the witness and she identified the exhibit as containing the picture she saw in the premises of the defendant company. That she visited the restroom approximately four times a day, upon arriving in the morning, rest periods during the day and upon leaving in the evening. That all the girls used the restroom and had access to it. The question was asked the witness by plaintiff's counsel: [12]

Question: Did you tell anyone after you saw it? (Referring to the photograph.)

An objection thereto was sustained and an exception allowed to the plaintiff.

Mr. Swerland: As to the defamation—the defendant is responsible for the republication of it. There are loads of authorities on that.

The Court: To whom are you referring by "anyone"? Are you referring to the people in the store or people outside the store?

Mr. Swerland: Outside the store.

Mr. Edge: She was an employee and I don't think we are bound by what she may have said outside the store—it's hearsay.

(Testimony of Jean Pierce.)

Mr. Swerland: I don't like to discuss it, your Honor, in the presence of the jury—its clearly and very definitely in point. There are a host of authorities on it.

The Court: The Jury may retire to the jury-room for just a moment.

The jury having retired, the following proceedings were had:

Mr. Swerland: Now, with respect to the extent of the circulation of the defamation, as evidence of the injury done the claimant it is clearly admissible. Corpus Juris is just loaded with citations on it, and American Jurisprudence have an abundance of them. The very nature and type of the action indicates it's very important because of the aggravation of damages. I would like to submit it is very material here by reason of the defendant's defense. They claim it was confined to this one spot.

(Discussion.)

The Court: It seems to me the problem we have here is to determine whether or not the repetition was the natural consequence of the act of the defendant. Clearly it wasn't within the scope of employment of this young lady to have slandered somebody by repetition. She wasn't employed for that purpose—the corporation is not responsible under that theory. Now, they put up in this room these pictures, visible to their employees, and I don't think there is any presumption—in fact the presumption is the other way—that the girls would not repeat around town whom they saw up there.

(Testimony of Jean Pierce.)

Now, if you have a case where a man is a notorious gossip around town, and you go to him with a slander, or even show him a libelous picture or a libelous article of some kind, then its the natural and logical thing for you to assume that he is going to repeat it. Lots of times people pick out that sort of person in order to get a story around town. That isn't this case. These people put up this picture—I don't think you can aggravate the damage or increase the damage by showing this specific act of the girl's repetition of it. You can show that the girls saw it, or knew it, the same as you can show circulation in a newspaper.

Mr. Swerland: The point is this if some of these girls knew the plaintiff prior to this libel—knew him in the community and see this picture pointing him out as a criminal its the natural thing for that girl to——

The Court: You haven't offered to show that anybody in authority in the Newberry Store knew that Mrs. Pierce knew this plaintiff. All the way thru on this rule the responsibility for republication is within "the natural and logical consequences" of the act—it was the "natural and logical consequences" of the act, and I don't see any "natural or logical consequences" because they put up this picture in this group that they are going to assume any of the girls knew them or any of the girls would tell anybody outside of the store about it. It was information for the employees of the Newberry store.

(Testimony of Jean Pierce.)

The witness further testified that the office employees used the restroom, although they did not wait on customers as they were in the office. That a matron, Miss Stanley, usually was in the room; that she did not wait on any of the customers not so far as I know. The witness further testified that she had attended the same church as the plaintiff; that he had a good reputation; that he attended church regularly. The witness further testified that during the course of her employment she saw the plaintiff's Exhibit "A" at numerous times; that it was never taken off the wall while she was there; that she was there "about a year and a half."

The witness testified that there had been shoplifters on occasion. "While clerking in the store I was supposed to be more or less on the lookout for shoplifters." That if checks were rendered in payment of purchases by customers they were sent to the cashier to have them cashed.

"Q. And you would look at the person who handed it to you? A. Yes.

Q. And you knew these pictures were there so that if someone handed a check and you recalled their picture being here you could report it to the store, isn't that right? A. Yes, I believe so.

Q. In other words, if some one came up to you with a small check and you would recall seeing their picture there you probably would go to the cashier and say 'I think this party's picture is upstairs on the board'?

(Testimony of Jean Pierce.)

A. Yes, I probably would report it."

That there was a sign on the door leading to the restroom marked "employees only," which was there all the time the picture was in room. That girl clerks and people and women from the office also went in there. That she lived about two blocks from the plaintiff, had known him for several years; that she did not know what his occupation was. That the matron was usually in the room and if anyone happened by mistake into the room they were told to get out, that the room was intended for employees only.

The witness testified that during lunch hour, during Christmas and on other occasions the matron was not in the room; that anyone could walk into the room, and during those times the door was not locked; that she did not know the exact amount but thought there was approximately 75 girls in the employ of the store at any one time, which was increased during the Christmas and other holiday season; that all of the employees, whether they were office workers or wrappers or engaged in any other capacity had access to the room. [13]

That each girl had a locker in this room; that there were two tables in the room for the girls to sit at and eat lunch; that if there was any plumbing work to be done the matron did not do the work, someone else was called in and would come into the room to do the work; that the bulletin board containing the picture was placed upon a cage where

(Testimony of Jean Pierce.)
the matron was located; that there was nothing hiding the picture from the vision of anyone in the room; that if any painting of repairing was required the matron did not do it, and other persons were then required to go into the room.

FRANCES MOHNEY

(Called on behalf of plaintiff.)

This witness testified that she had been in the employ of defendant company as a sales girl from about a week before Easter until July of 1942.

Her testimony was to like effect as the testimony given by the witness Jean Pierce.

She testified that she had no duties with respect to checks and that if customers wanted to cash checks or pay with checks they were sent to the cashier to get the money to pay the clerks with. That she had known plaintiff, attended the same church as plaintiff and knew that he had a very good reputation but that when she saw the photographs of plaintiff she believed it might be true; that she saw the photographs several times during the course of her employment; that after her employment was terminated in July she saw the picture in that room on two occasions. On one occasion she went in to see a friend of hers that was employed there and on the second occasion she went in at the request of counsel of plaintiff to ascertain if the picture was there;

(Testimony of Frances Mohney.)

that she saw the picture there and was not restrained.

The witness further testified that she was eighteen years of age. That after she quit the store she went on strike and picketed them for a few weeks, and when she visited the employees' room following termination of her employment she knew she had no business there, and that it was against the company's rules for her to be there, and that she was not invited by anybody. That she was instructed by Mr. Swerland to get some photographer to take pictures in the room. Knowing that it was against the rules to be there; 'that the store was troubled occasionally by shoplifters and she was supposed to look out for them.' Some of the photographs were marked 'shoplifters.' That she went back to work for Newberry's for two or three days after she quit picket duty. That she had mentioned to her father and may have to other persons that plaintiff's photograph was posted in the defendant company's store under the heading of "check artists." That on or about the first of September the [14] witness had gone with a photographer to the defendant company's store to take a picture of the restroom and was advised by Mr. Waltman, the manager, that the Police had advised the defendant company to take the picture down, which had been done that morning, and prevented the witness from photographing the room. That when she saw Nichols' picture while working there and recognized it, she didn't go to the management

(Testimony of Frances Mohney.)
and make any complaint about it. That when she went to take the picture she met the floorwalker and he told her they were not supposed to enter that room and if they did the police would stop them.

HELEN COFFEE

called on behalf of plaintiff.

This witness was eighteen years of age and had been employed by the defendant company two days before Christmas where she had gift wrapped packages in the basement and waited on customers for about two hours; that her attention had previously been called to the picture by her sister, Mrs. Jean Pierce, and she had seen it and recognized it as a photograph of plaintiff.

Her testimony was to like effect as the witnesses Jean Pierce and Miss Frances Mohney. I worked one day. My attention was called to the photograph by my sister.

MISS FRANCES STANLEY

called on behalf of plaintiff.

This witness was in the employ of the defendant company at the time of the trial and for seventeen years prior thereto as floor-lady on the second floor, clerk, stock clerk and as matron. That from the Spring of 1941 to September 1942 she was matron

(Testimony of Frances Stanley.)

on the second floor; she testified that approximately sixty girls are employed in the store at one time and on holiday seasons the number of employees are increased; that there was a rapid turnover in the help at the store; that she had charge of all the girls; that the office employees did not wait on trade.

That the photographs contained in plaintiff's Exhibit "A" were placed in the bulletin board and locked and remained on the bulletin board without any change. They were there for a period of time and remained the same the whole period of time. She testified further that she cashed no checks; that any employee that received a check was instructed to send the customer to the information desk and the cashier would ascertain whether she was to cash the check or not; that [15] the cashier was the only one to pass upon the checks; that the cashier had access to plaintiff's Exhibit "A". That she left the room on lunch hours and on other occasions and left the door unlocked. That the room was cleaned by the night janitor who had access to the room and plaintiff's Exhibit "A"; that if required, plumbers would be called in and they too would have access to the room and plaintiff's Exhibit "A"; that if painting were required to be done, painters would have access to the room and plaintiff's Exhibit "A"; that if repairs were required to be done, the repairmen would have access to the room and plaintiff's Exhibit "A"; that the pictures contained in plaintiff's Exhibit "A" were not taken down each night but were firmly affixed to the wall and always

(Testimony of Frances Stanley.)

in a visible position; that the witness had no duties to perform in connection with checks; that most of the girls in the employ of the store were about eighteen. That the names of the individuals were not contained on the photographs. All girls were instructed to keep their eyes open for shoplifters or people passing bad checks, and to watch the actions of people under suspicion of being shoplifters, and to report the same to the floor lady. There were shoplifters and people passing bad checks—goes by streaks, sometimes worse than others, but after these pictures were put up in the store and other stores around there was apparently a subsidence of those activities. The entrance to the employees' room, you enter a door facing east and go along a hallway about 15 feet long and 4 feet wide, and then it opens into the employees' room. There were about six girls in the office and probably 60 all told. Sometimes the sales girls work in the office. The room in question was accessible to all the girls in the store regardless of the type of work they did.

THOMAS J. WALTMAN

called on behalf of plaintiff.

This witness testified that he was the manager of the defendant company's store located in Spokane and had been since 1934; that under normal business conditions the average number of employees would be around 60 and that at Christmas time there

(Testimony of Thomas J. Waltman.)

would be between 140 and 180 employees at any one time; I cannot give the definite number, because I never counted them; that the restroom was located on the second floor of the store and was used by all the female employees; that the pictures contained in plaintiff's Exhibit "A" were contained in a frame and placed in the room; that these pictures were supposed to have been photographs of persons with criminal records; that he took no means to ascertain whether they actually were or not; that he did not call the Police and ask whether they actually were or not; that he did not call the Police and ask whether the particular persons whose photographs appeared on Exhibit "A" had criminal records although police numbers were contained thereon and made no inquiry whatsoever but merely took it for granted that they were; [16] We took it for granted they were persons with a criminal record when the pictures came from the police department. They were delivered by the police department to the Retail Trades Bureau; that he received the pictures from the Retail Trade Bureau at a luncheon composed of leading merchants of Spokane at the Davenport Hotel; that these photographs were placed on a table beside his plate, wholly uncovered, and were visible to waitresses; that the pictures were individual photographs when he received them; that he pasted them on a piece of cardboard and then put them together in a frame which was put on the bulletin board in the girls' restroom where they were kept from the early part of 1941 continuously

(Testimony of Thomas J. Waltman.)
until September 1942, a period of approximately a year and a half. That the plaintiff's picture was under the title "Check artists"; that the plaintiff's Exhibit "A" was in a visible position and not obstructed by anything; that they had two janitors, both of whom had access to the room and the plaintiff's Exhibit "A"; that the plumbers, painters, and other repairmen all had access to the room and the photographs contained in plaintiff's Exhibit "A" and were visible to them; I don't believe we had any painting done during the time the picture was up there, but I am not positive. There were no repairs made during that period; that the salesgirls and wrappers had no authority to cash checks but would refer them to the cashier; that the janitors had no duties with respect to checks. On the back of the pictures were pencil notations made by the police department and were there when we received the pictures, and we classified them according to the notations on the back. There were 13 of them altogether and no complaint was made about any of them except this one of Nichols, and the girls were instructed to be on the lookout for those parties and if they saw anybody do anything to report it to the store, which is one of our biggest problems in any store.

That the girls were instructed to be on the lookout for shoplifters; that no one was allowed in the room but the girl employees, janitors and repairmen; that the public was not allowed in the room; there was a restroom for the public use; that the

(Testimony of Thomas J. Waltman.)

photographs were delivered to the defendant company from the Retail Trade Bureau without any request. Many times they have brought other groups direct from the police department and left them with us; that the witness had been with the defendant company for fourteen years. Neither myself or our store had anything to do with the taking of this picture, or with what happened to Nichols that resulted in this picture being taken. I knew nothing about him whatever other than what I heard since. When it was finally called to my attention that there was some claim about this picture, and I didn't know which man wanted the picture or whose picture was there, and I took all the pictures down immediately.

That other than a door with a sign marked "Employees only" there was nothing to prevent the public from entering the room as the door was not locked, but it was closed. That when this witness received the photographs at the Davenport Hotel and had them in his custody upon the table, he did so as the representative for the defendant company. [17] The Retail Trade Bureau is a branch of the Chamber of Commerce, composed of the leading merchants of Spokane and is one of the committees of the Spokane Chamber of Commerce.

RAY MOHNEY

called on behalf of plaintiff.

The witness, a brass molder, and resident of Spokane, testified he was the father of Frances Mohney; he had known the plaintiff, attended the same church and knew that he had a good reputation, did not know what occupation plaintiff was engaged in. The question was asked by plaintiff's counsel:

Q. Didn't you know of your own knowledge that the plaintiff's picture was in Newberry's?

A. No.

Question: Did you know the picture of Mr. Nichols was in the store of the Newberry Company?

An objection thereto was sustained.

The further question was asked of the witness by plaintiff's counsel:

Question: Were you informed the picture of Mr. Nichols, the plaintiff in this action, was posted in Newberry's store, in which he was described as a "check artist"?

This was objected to as incompetent, irrelevant and immaterial and not binding on this defendant and the objection was sustained.

Mr. Swerland: At this time I submit an offer of proof along this entire line.

The witness further testified that he believed there was a picture of the plaintiff posted in Newberry's wherein he was described as a check artist, and that he believed him to be portrayed there as a person with a criminal record; that he had known Mr. Nichols, the plaintiff, for six or seven years, and prior to the time he heard of plaintiff's Ex-

(Testimony of Ray Mohney.)

hibit "A" he had always had a good reputation; that after hearing of plaintiff's Exhibit "A" he believed there might be some truth in the charge.

The question was asked the witness by plaintiff's counsel:

Question: Did you tell anyone else about it?

An objection thereto was sustained.

A. S. MOTT

called on behalf of plaintiff.

The witness, a resident of Spokane, and a carpenter, testified he knew plaintiff about twenty years and always knew him as an honorable and respectable citizen, attended the same church. [18]

The question was asked by plaintiff's counsel:

Question: Did you believe the picture of Mr. Nichols had been posted in the store of Newberrys, originally described as a "check artist"?

An objection thereto was sustained.

An offer of proof with respect to the fact that the witness heard about the picture being there was made by counsel for the plaintiff; that the information the witness may have had was obtained from others.

The witness testified he knew plaintiff had been arrested and that he had been kept in jail for some time, and that he subsequently had been released.

The question was thereafter asked by plaintiff's counsel:

(Testimony of A. S. Mott.)

Question: These charges against him were subsequently dismissed, if you know?

An objection was interposed and sustained.

I didn't know that Newberry's store had anything to do with his difficulty. I went down to the jail and talked to him. I knew Mr. Nichols had been arrested for forging checks. I got a few friends in town and the people in our church put up money as bail for Mr. Nichols. The Newberry Company, to my knowledge, had nothing to do with what happened at the ail. I don't think they had him arrested. I think a grocer out in Hazelwood Park by the name of Hummer made the complaint against him and Newberry had nothing to do with it. Mr. Lally was deputy prosecuting attorney and had charge of the case.

MARVIN S. NICHOLS

called on behalf of plaintiff.

This witness, plaintiff in this action, testified as follows: That he was employed at the Rolling Mills; that he had been residing in the City of Spokane for approximately six years, prior thereto and from 1922 to 1937 had resided in St. Maries, Idaho; that he resided at Sanders, Idaho, from 1903 until 1922 and that he was born in Pennsylvania, near Marshbury. That he is a married man with a wife and three children, with whom he resided. That he had never been convicted of a crime anywhere or of a traffic violation.

(Testimony of Marvin S. Nichols.)

That he had been arrested in Spokane for forgery April 17, 1941, upon the charge of a Mr. Hummer who operated a service station and confectionery. That he had been kept in jail for twenty-seven days and nights and the charges were subsequently dismissed. That while he was in jail certain of the alleged forged checks appeared; that a man by the name of Ben Forman was subsequently arrested and convicted of the crimes of which this witness had been charged. That he did not know this Ben Forman and had never seen him.

Q. Have you ever known anyone who knew him?

A. Oh, yes.

Q. I am referring to Ben Forman, do you know anyone who knew Ben Forman?

A. Yes, I know somebody that knows him.

That the witness had never forged any checks and had an action [19] pending in the Superior Court of Spokane County, Washington, against the Police Department for false arrest. That prior to this arrest he had never been arrested in his life for anything at all; that he attended church regularly; that he never caused anyone to forge any checks for him.

That he learned that his picture was posted in Newberrys; that after learning about it he was ashamed to meet people on the street and ashamed to go into the stores; that he had been a customer of Newberrys for some time and he felt humiliated, worried about it, and lost sleep over it; that his little girl came home and said that a little boy told

(Testimony of Marvin S. Nichols.)
her in school that her daddy was a criminal; that he felt humiliated and ashamed as a result of it.

The witness identified his photographs among those contained in plaintiff's Exhibit "A"; that there was no one that he knew of that resembled him; that he felt when he went into stores that there might be people there that might have worked at Newberrys and could feel them pointing their fingers at him.

They were some folks who identified me as the man who cashed these checks. He was supposed to have cashed some checks in Paul's place, and Pearl Henderson, the grocery lady, identified me as having cashed checks. Also Elmer J. Hummer. He was the fellow that swore out the warrant for me. He identified me as the man who cashed the checks in his place; also someone from the Royal Men's Shop identified me too; also Mae Chipman who lives right across the street about 200 feet from my home, she identified me. I have a suit for damages against Mr. Colburn, City Commissioner, The Firemen's Fund Indemnity Company, Angus McDonnell, a police officer, David G. Paul and Harriet Paul. That his action against the City Commissioner and others for his false arrest had been reduced from $60,000 to $25,000; that certain of the defendants had been dropped from the suit; that he had worked on the WPA at $55.00 a month for five hours work a day prior to the time he was arrested; that he was now working at the Rolling Mills and received $7.36 a day for an eight hour day. That

(Testimony of Marvin S. Nichols.)

he was off a little over a month before he obtained a job after he was arrested; that then he worked in the woods for five dollars a day; that he lost several weeks employment and had lost several jobs but did not know why; that he had been working steadily; has been working steadily now for six months at 92 cents an hour, which is one of the highest paid jobs around Spokane. That before the six months' job he was off for 3 or 4 days; that before that he worked for the John Lewis Packing House as a carpenter getting $1.40 an hour; that he worked at various jobs from time to time; that he knew Mr. Hummer having been in his store; that his handwriting and the handwriting on the Hummer checks was not similar; that the suit in the State Superior Court was pending. [20] I was arrested on the 17th day of April, 1941, and didn't learn about the picture at Newberry's for about six months after that which was after I had been dismissed from that case. I wouldn't know that Newberry's store had ever taken any part in my arrest.

That defense employment was more available now; that the identification of him was false and he had sued all of the witnesses that had identified him, which suit was presently pending; that he found out his picture had been put up over a year ago from his wife and neighbors who had called it to his attention; that people at his place of business had called it to his attention; that he had always prided himself on having a good reputation; that having him put in jail caused him a certain amount

(Testimony of Marvin S. Nichols.)
of anguish and humiliation and he suffered more on account of the picture that had been posted in Newberrys; that he presumed the picture was in other places too and suffered mental anguish by reason thereof; that he did not go into the Newberry store to see about the picture at any time; the fact that I was in jail and my friends knew about it didn't trouble me so much as the picture being in the store. Although I suffered a certain amount on account of hiring a lawyer, the anguish I suffered by being in jail wasn't anything compared to the anguish I suffered from the picture being down there. I suffered more on account of the picture than being locked up; that he had already been cleared of having forged any checks when this picture was up there; that he knew the pictures contained in plaintiff's Exhibit "A" had come to the attention of his friends and neighbors.

ELLA C. MOTT

called on behalf of plaintiff.

This witness, the wife of A. S. Mott, testified to like effect as her husband. The witness testified further that it was her understanding that the picture of plaintiff had been posted in Newberrys store wherein he was portrayed as a check artist; that the witness had previously understood plaintiff had been cleared of the charge of forgery when she ascertained the picture was posted in Newberrys. I

(Testimony of Ella C. Mott.)
think the whole thing was a humiliation from "A" to "Z". I never investigated the case myself and know nothing about the circumstances leading to his arrest except hearsay.

GLADYS CLARK

called on behalf of plaintiff.

This witness, a housewife, testified she resided in Spokane eighteen years; had known plaintiff between nineteen and twenty years; knew him at St. Maries, Idaho, prior to the time he came to Spokane; knew that he had a good reputation, was an honest, law-abiding citizen. Testimony to same effect as witness Ella C. Mott and A. S. Mott. [21]

MRS. MILDRED NICHOLS

called on behalf of plaintiff.

This witness, the wife of plaintiff and a housewife, had been advised a little over a year ago that her husband's picture had been posted in the Newberry store wherein he was portrayed as a check artist; that after hearing of it her husband cried, was very crushed and depressed, felt ashamed to go anywhere, seemed heartbroken, spent sleepless nights; that other friends and acquaintances had called his demeanor to her attention; that they had

(Testimony of Mrs. Mildred Nichols.)

been married seventeen years; that her husband had never been in any kind of trouble at all and had never been arrested other than on the occasion testified to by her husband; that the charges had been dismissed; that when the pictures were posted at Newberrys store the charges of forgery had already been dismissed against him; that her husband had never been convicted of any crime anywhere.

That they came to the house with a warrant and arrested her husband and kept him in jail for twenty-seven days; that so far as she knew the Newberry Company had nothing to do with the arrest. That she had heard the picture was at Newberrys about a year ago; that she knew three of the girls that worked in the store.

At this point plaintiff rested his case.

DEFENDANT'S TESTIMONY

E. J. HUMMER

called on behalf of defendant.

That he had made the complaint against someone who had cashed a check in his place; that so far as he knew the Newberry Company had had nothing to do with the transaction. The question was asked by defendant's counsel:

Question: Was the party against whom you made the complaint, Mr. Nichols, the plaintiff in this case?

(Testimony of E. J. Hummer.)

The question was objected to on the ground that whether the witness had complained or not against the plaintiff did not constitute a defense to [22] libel and the only defense would be the truth of the charge could be proven, and upon the further ground that good faith was not a defense to this action.

The objection was overruled and the witness testified that the plaintiff was the party against whom he had made the complaint.

RICHARD DUNNING

called on behalf of defendant.

That he had been, during the period involved in this trial, the Secretary of the Retail Trade Bureau of the Spokane Chamber of Commerce. The question was then asked by defendant's counsel:

Question: Did you, while Secretary of that Bureau, have to do with the distribution of some photographs that came from the Police Station?

The question was objected to and the objection overruled.

The witness testified that the Police Department had given them two sets of pictures, one having to do with shoplifters and the other having to do with check forgeries. That they distributed them to the

(Testimony of Richard Dunning.)
merchants through their Retail Bureau; that the Newberry Company did not request them to furnish them with pictures.

At this point defendant rested its case.

REBUTTAL TESTIMONY

MARVIN S. NICHOLS

recalled on behalf of plaintiff.

That the charges filed by Mr. Hummer had been dismissed. [23]

Whereupon the case proceeded to argument.

After argument the Court instructed the Jury as follows:

Judge Schwellenbach: Members of the Jury: You have heard the testimony and the arguments of Counsel, and it now becomes the duty of the Court to instruct you concerning the issues in the cause and the law involved with respect to those issues, and as it is the Court's duty to give you these instructions concerning the law it is equally your duty to accept these instructions as the law. There is a very distinct line and demarkation between the function of the Court and the function of the jury in the trial of any case. The function of the jury is to pass upon questions of fact and I have no right to invade that function. It is the duty of the Court to pass upon questions of law

and you have no right to invade that province. [134]

You will consider the instructions as a whole, and not place undue emphasis on any particular portion of them.

The issues in this case are made up by what is known as the 'pleadings'. You will take them with you to the jury room. They are not evidence and are not so to be considered by you. They are simply a summary at the outset of the trial of what each party expects to prove.

The plaintiff's pleadings consist of an amended complaint, in which the allegation is made that this defendant between the spring of 1941 and continuing until September, 1942, published a defamatory libel by publishing a photograph and representation of the plaintiff in which the plaintiff was marked and pointed out as a 'check Artist', and on which picture are shown identification numerals such as are customarily placed on photographs of persons with criminal records. The plaintiff alleges that the implications are not true; that he is not a check artist, and had never been convicted of a crime, and he is damaged by reason of that fact—that he suffered pain and anguish, and was brought into public discredit and disgrace among the citizens of the community to his damage in the sum of $50,000.

To this the defendant has interposed an answer in which are made certain denials, denying any attempt on its part to injure the plaintiff; denying

upon information and belief that it ever did publish the picture of the plaintiff as [135] alleged in the complaint; denying the publication was false, malicious and defamatory, and denying the allegation, on information and belief, concerning the question as to whether or not the plaintiff ever had been guilty of passing forged checks; denies that plaintiff was damaged in the sum of $50,000, or in any other sum. Then, on yesterday, the defendant submitted a trial amendment, or a first and second affirmative defenses. I refused to permit the first affirmative defense and I have crossed it out on this paper. The Second Affirmative defense I permitted to be submitted. It reads: "Defendant conducts a variety store in the city of Spokane. Customers frequently tender checks to defendant's employees in payment of purchases, and defendant has suffered losses from cashing checks which have been forged, or which have been drawn against accounts in which the party had no funds or insufficient funds. The Police Department of the city of Spokane furnished to the Retail Trade Bureau, an organization of merchants, photographs of persons who had been found to have passed worthless or questionable checks, so that the photographs could be shown to employees of retail stores in order to prevent the acceptance of such checks, and the photographs published by the defendant were furnished in the manner and for the purpose aforesaid by the police department of the city of Spokane,

and if the defendant published plaintiff's photograph such publication was made only [136] to defendant's employees for the purpose, in good faith, of preventing the acceptance of worthless or questionable checks in defendant's store, and was privileged."

To that the plaintiff has interposed an oral reply, this amendment having been too late for the plaintiff to prepare a paper, and that was permitted yesterday, as you will remember, so you will consider the allegations of this affirmative defense denied by the plaintiff.

You are the sole and exclusive judges of what is the evidence in the case, and the weight and credibility to be given the testimony of each witness who has appeared on each side. In doing this you may take into consideration the conduct, appearance and demeanor of the witness while testifying, his or her apparent candor and frankness, or the lack of those qualities, if any such lack appears, the reasonableness or unreasonableness of the story told by the witness, its probability or improbability measured by your common experiences in life, the opportunity or lack of opportunity on the part of the witness or knowing or being informed concerning the matters about which he or she testified; his intelligence or lack of intelligence displayed by the witness, the interest or lack of interest on the part of the witness in the outcome of this case, his bias or prejudice, if any, which would cause him to warp or

color his testimony. If you find from the evidence that any witness has wilfully testified falsely to any material fact in the case then you are at liberty to disregard the entire testimony of such witness unless [137] it is corroborated by other testimony of a credible character.

When in these instructions I use the word 'burden' I mean the burden of proof. This being a civil case the party having the burden of proof must prove his point by a fair preponderance of the testimony. The expression 'fair preponderance of the testimony' or evidence, means the greater convincing force or weight of the evidence. It means that which appears to you as the more reasonable and more probable happening or event. It does not necessarily mean the greater number of witnesses testifying to or against a given proposition or claimed fact or series of facts, nor does it make any difference by which side the evidence is offered. It means that, taking all the evidence on that particular issue into consideration, no matter which side may have offered it, the convincing weight, the proving force, of the evidence is in favor of one side as against the other. If on any issue you find the scales evenly balanced, then you must decide that issue against the party having the burden of proof on that particular point.

Now, the plaintiff has the burden of proving the allegations of this complaint, and in so far as the allegations of the complaint are denied by the de-

fendant, either directly or on information and belief, the plaintiff has that burden. The defendant has the burden of proving its affirmative defense that I just read to you, that having been denied by the [138] plaintiff. The defendant in this case issued what might be properly called a first affirmative defense and that is the defense of 'truth'. In a case of this type the burden is on the defendant of proving the truth of the defamatory matter, so for the particular purpose of this case the defendant interposes two affirmative defenses, one, the truth, and, second, the privilege which it alleges it was entitled to.

This is an action to recover damages for the publication of an alleged libel. Libel is defined as consisting of every publication by writing, printing, picture, effigy, sign or otherwise than by mere speech which shall tend to expose any living person to hatred, contempt, ridicule, obloquy, or deprive him of the benefit of public confidence or social intercourse.

I instruct you that the photograph of the plaintiff which has been exhibited to you is libel per se. If it was published by the defendant, unless it were true, or unless the publication were privileged as I will explain to you, the plaintiff is entitled to recover in damages. The burden is on the plaintiff to prove the publication. The libel must be communicated to some person other than the person defamed. This element of communication is given

the technical term of 'publication'. That does not mean that it needs to be printed in a newspaper or magazine. It may be conveyed by pictures or photographs. Nevertheless it is libelous even though it does not contain the name of the party thereon. It is not necessary that the publication be made known to [139] the public generally. It is sufficient if it is made to a single person. It is furthermore sufficient if the person is unacquainted with the plaintiff and understands the publication to refer to the plaintiff. Even though the persons having heard the defamatory matter have not believed it you may consider the fact they heard it in considering the damages in this case.

The law places upon the person or corporation making the publication the burden of proving the statements contained in the publication are true.

It is presumed that every person enjoys a good name and reputation as a citizen in the community and conducts himself with honesty and integrity.

As I have indicated before, your first problem is to determine whether or not there was a publication of this picture. If you find there was a publication and the plaintiff has sustained the burden of proving the defendant did publish this picture then the next question is whether or not what was contained thereon was true. The defendant alleges it is true and the defendant has the burden of proving that.

I have given you the standard by which you can

judge the question of burden of proof. Then we come to the second affirmative defense of defendant and that is what was done was privileged. The defendant pleads affirmatively the defense of privilege, that is to say, even though the publication was false, and even though it did publish the publication it is not liable [140] for the publication because it contends the publication was made in good faith on subjects in which it had an interest or duty and made to person or persons having a corresponding interest or duty.

The law recognizes such a privilege. In the operation of a business it is necessary at times for persons connected with that business to communicate to other persons connected with the business in the protection of its interests. The law says such communications shall be privileged under certain conditions, and those conditions are as follows (1) the publication must have been made in good faith, (2) that they are reasonably necessary to the operation of the business, (3) that they are only communications to that person or those persons to whom the knowledge and the information is reasonably required for the protection of the business, or if *some* else other than those in that category do seek the information that every reasonably careful effort has been made by the person doing the communicating that no one other than those that had the duty or interest with respect to the defamatory matter had access to such defamatory matter or visible to

them. Of course if such publication has been made maliciously the privilege does not exist but the burden rests on the plaintiff to show malice in such a case.

You have heard the testimony in this case. Whether or not the defendant is entitled to this claim of privilege or defense of privilege, is a matter of fact for you to determine in this case under the rules I have given [141] to you and all the circumstances surrounding the case.

There has been testimony that the pictures were secured from the Spokane Retail Trade Bureau, a branch of the Spokane Chamber of Commerce, and by them from the police department. You will consider that fact only in connection with this defendant and only in connection with the question as to whether or not what was done was done in good faith. The corporation is liable for any defamatory matter published by its agents or employees in the scope of their employment.

If you find the plaintiff is entitled to recover in this case, in deciding the amount of plaintiff's actual or compensatory damages, if you believe from the evidence the plaintiff has been damaged by the defendant you may take into consideration the extent of the circulation given to the picture, that is to say, the number of people to whom it was exhibited, or accessible, and to whom it was visible, and the length of time it was visible. You may take into consideration any grief, or agony, mental

suffering, mortification and humiliation, if any, the plaintiff has undergone. In this connection you may consider the mental suffering sustained by the plaintiff by reason of his wife and children, not as to the effect of the defamatory matter upon them but as to the effect upon him. If you believe from the evidence that the plaintiff's reputation was injured and that he did suffer grief and anguish, mental suffering, mortification or humiliation, then you may award the plaintiff an amount that will fairly compensate [142] him for the damages, if any, he has sustained, or that damage, if any, he may be reasonably certain to sustain in the future, not exceeding the sum sued for in the complaint, $50,000. This amount must be such as to compensate plaintiff, and not for the purpose of punishing the defendant or making an example of the defendant, and you *must permit* sympathy or prejudice to have any part in deciding this case, or deciding the amount, if any, of the compensation.

When you shall have retired to your juryroom you will take with you the pleadings in the case, and this one exhibit. You will elect one member of the jury as foreman who will preside over your deliberations as a jury, and who will represent you in the further conduct of this case in Court. You will also take with you two forms of verdict, one reading 'We the jury in the above entitled cause find for the plaintiff in the sum of (blank) dollars.' When you have ascertained the amount that amount

will be inserted in the blank space and that verdict then signed by your foreman. The other form reads 'We, the Jury in the above entitled cause find for the defendant'. If that is your verdict then your foreman will sign that verdict. It will require the concurrence of the entire jury in order to arrive at a verdict. When you have arrived at your verdict you will return it properly signed into court in the presence of the entire jury.

(To Counsel): Are there any questions?

Mr. Swerland: Yes, your Honor, I have [143] certain exceptions.

The Court: Under the procedure in this court Counsel for either side have a right to make any suggestions, and they have to do that prior to the time the jury retires to consider of its verdict. The jury will retire to the juryroom but you are not retiring for the purpose of considering your verdict. You will be called back in a few minutes and then you will retire for that purpose.

Whereupon, the jury having retired the following proceedings were had.

Mr. Swerland: The Court having instructed the jury, and the jury not having retired to consider its verdict the plaintiff now excepts to the refusal of the Court to give its requested instruction No. 3.

The Court: What one is that?

Mr. Swerland: That's the one on the law on libel per se——

The Court: I gave all of it that I thought you

were entitled to on it. The first instruction I gave I left out 'defined by Remington's Revised Statutes of Washington, Section 2424'—that's the criminal statute.

Mr. Swerland: The one I had reference to is the right to recover damages is absolute where libel is deemed to be found.

The Court: I didn't give that because the Supreme Court has held to the contrary in Wilson vs. the Publishing Company. If you had used the term [144] 'nominal' damages. I didn't think you would want me to insert the word 'nominal' before the word 'damages' so I left it out entirely.

Mr. Swerland: Plaintiff excepts to the refusal of the Court to give requested instruction No. 4.

The Court: Exception allowed to the refusal to give instruction No. 3 for the reason I have stated.

Mr. Swerland: With respect to instruction No. 4 plaintiff expressly excepts on the ground that the requested instruction is a correct statement of the law and there has been evidence introduced on that question indicating the length of time.

The Court: I gave it. I inserted it in the later instructions as to damages, about the length of time and extent of circulation.

Mr. Swerland: Then plaintiff withdraws that exception.

The plaintiff expressly excepts to the refusal of the Court to give requested instruction No. 5 upon the ground this represents a correct statement of

the law, and the fact that the defendant might have received the libel from some other person is no excuse or justification. We think, your Honor, that is a very important element in the case.

The Court: Exception allowed.

Mr. Swerland: Plaintiff excepts to the refusal of the Court to give requested instruction No. 9 upon the ground this represents a statement of the law. [145]

The Court: Exception allowed.

Mr. Swerland: Plaintiff further excepts to the refusal of the court to give its requested instruction No. 13 upon the ground that it represents the statement of the law, and the proof of justification in a defense to libel must be as broad as the charges, and the charges in this case being that the plaintiff was a check artist and a forger, and had been guilty of the crime of forgery.

The Court: Exception allowed. I don't think it went that far.

Mr. Swerland: With respect to requested instruction No. 14 the plaintiff expressly excepts upon the ground this represents a correct statement of the law and that good faith is not an element in this case.

The Court: Exception allowed.

Mr. Swerland: That is all.

Mr. Edge: There is one matter that occurred to me as being somewhat serious. In my answer I was very careful not to deny he was innocent, but

maybe under the rule that's the construction. I simply alleged we didn't know—had no information, but did not go on and say 'therefore denies'. We simply said we had no information. I was very careful to keep that out. I didn't want to be in the position before the jury of trying to convict this plaintiff, because I had serious doubts the man was guilty, although there [146] were some circumstances.

The Court: But you argued all around the question of whether or not he was guilty and I had to present the matter to the jury as to the burden in the case, so I just took your allegation even though on information and belief and presented it as a defense for you then told you you had the burden of proving it.

Mr. Edge: Well, I am simply presenting it.

The Court: Exception allowed.

Mr. Edge: We proposed instruction No. 7—"You are instructed that the defendant in this case was required to exercise reasonable care to prevent said photograph from being exhibited to those not entitled to see it; and if you believe from the evidence that the defendant did exercise reasonable care not to improperly exhibit said photograph to the public, then your verdict should be for the defendant."

I don't know if your Honor covered that in your instruction.

(Discussion.)

The Court: I will allow you an exception for not having given proposed instruction No. 7. I think I touched it.

Mr. Edge: I think so in a way. I think that's all I had in mind.

Whereupon the Jury was recalled, bailiffs sworn, and jury again retired to consider their verdict.

[147]

[Endorsed]: Filed April 22, 1944. Paul P. O'Brien, Clerk. [24]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 296

MARVIN S. NICHOLS,

Plaintiff,

vs.

J. J. NEWBERRY COMPANY,

Defendant.

PLAINTIFF'S REQUESTED INSTRUCTIONS

[148]

Instruction No. 1

This is an action to recover damages for the publication of an alleged libel. "Libel" is defined by Remington's Revised Statutes of Washington, Sec-

tion 2424 as consisting of "every malicious publication by writing, printing, picture, effigy, sign or otherwise, then by mere speech, which shall tend to expose any living person to hatred, contempt, ridicule, obloquy, or deprive him of the benefit of public confidence or social intercourse." I instruct you that the photograph of plaintiff which has been exhibited to you is libelous on its face, if false, and the same was unprivileged. The defamatory matter complained of in this case being libelous if you find that it was also unprivileged, the right of the plaintiff to recover damages by reason of its publication is absolute, if you find that the publication complained of was false. The questions therefore for you to determine are whether the defamatory matter was true or false and unprivileged and if false the amount of damages to which under all the circumstances shown by the evidence the plaintiff is entitled. [149]

Instruction No. 2

When a publication is libelous on its face or per se, that is, in itself, the publication is presumed to be false; that is, the plaintiff is not required to show that it was false, but the law places upon the defendant, that is, the person or corporation making the publication, the burden of alleging and proving that the defamatory statements contained in the publication were true. If you find that the defendant has failed to sustain its burden of proving that the defamatory matter contained in the publication were true, then you must find for the plaintiff. [150]

Instruction No. 3

You are instructed that you must distinguish between the evidence which has been introduced by the defendant for the purpose of establishing the truth of the publication and that which was introduced by the defendant for the purposes only of mitigating or lessening the damages. You are instructed that where a publication of the character of that complained of by the plaintiff is falsely made, the right of the plaintiff to recover damages by reason of such publication is absolute and the only question which remains for the jury to determine, if they find the defamatory matter, or any part thereof, pertaining to plaintiff to be false, is the amount of damages to which under all of the circumstances shown by the evidence the plaintiff is entitled. [151]

Instruction No. 4

In considering the damages plaintiff may have sustained, you may take into consideration the length of time and consequent extent of the circulation that may have been given to the publication. You may also consider whether defendant took any means to ascertain whether the defamatory matter it exhibited was true or false. [152]

Instruction No. 5

I further instruct you that if you find that the defendant has failed to sustain its burden of proving that the defamatory matter complained of was true, then you must find for the plaintiff and the fact that defendant may have received the defama-

tory matter from some other person or agency does not excuse or relieve defendant from liability.

Phillips v. Union Indemnity Co., 82 F. (2d) 154. [153]

Instruction No. 6

It is presumed that the plaintiff at the time of the publication of the defamatory matter complained of in this action enjoyed a good name and reputation as a citizen of the community and prior to said time had always conducted and demeaned himself with honesty and integrity.

Luna De La Peunte v. Seattle Times Co., 186 Wash. 626. [154]

Instruction No. 7

I further instruct you that it is not necessary that the publication be made known to the public generally. It is sufficient if the publication was made known to a single person. It is furthermore sufficient if persons unacquainted with the plaintiff understood the publication to refer to plaintiff. I further instruct you that even though certain persons having heard of the defamatory matter may not have believed it, that nevertheless you may consider in assessing your damages the mental suffering, shame, mortification and humiliation of plaintiff. [155]

Instruction No. 8

I instruct you that in order for the defamatory matter to be privileged, the party making it must be careful to go no farther than its interests or duties require, and that if you find that the defamatory

matter complained of was exhibited or visible or accessible to persons who would have no duties or interest with respect thereto, then I instruct you that there is no privilege whatsoever, and you must find for the plaintiff.

Beardsley vs. Tappan, 77 U. W. 427
Lathrop vs. Sundberg, 55 Wash. 144
36 Corpus Juris P. 1243 [156]

Instruction No. 9

I further instruct you that one who publishes defamatory matter is liable for the injurious consequences of the repetition thereof by third persons where such repetition is the natural and probable result of the original publication.

33 Amer. Juris 197 P. 185 [157]

Instruction No. 10

I further instruct you that a corporation is liable for defamatory matter published by their agents and employees in the scope of their employment.

Ecuyer vs. New York Life, 107 Wash. 411
[158]

Instruction No. 11

You are instructed that if you find that the defamatory matter complained of was untrue, nevertheless, if you also find from the evidence that the said defamatory matter was published without malice on the part of defendant, but in good faith, believing it to be true, then in that case your verdict should be confined to the actual damages sustained by plaintiff, because in this state malice is not an

essential element of civil libel and plaintiff may obtain a recovery even though defendant may have acted in good faith.

Wilson vs. Sun Pub. Co., 85 Wash. 503 [159]

Instruction No. 12

I instruct you further that a libel must be communicated to someone other than the person defamed. This element of communication is given the technical name of "publication" but this does not mean it must be written or printed. It may be conveyed by the exhibition of a picture and a photograph is nevertheless libelous even though it does not contain the name of the plaintiff thereon.

Peck vs. Tribune, 214 U.S. 185

Louka v. Park Entertainments, 294 Mass 268 [160]

Instruction No. 13

I instruct you further that the defendant has the burden of proving the defamatory matter true and that this proof must be as broad as the charge; that is to say, in this case, the defamatory matter complained of charges the plaintiff with having committed the crime of forgery. The defendant, therefore, in order to sustain its burden of proving the libel true must prove that the plaintiff was convicted of the crime charged. It is for you to say whether the defendant has sustained this burden of proof.

103 Kansas 192, 173 Pac. 414,

LRA 1918 F. 153 [161]

Instruction No. 14

I instruct you further that it is no defense that the defendant may have published the libel complained of in good faith or in the absence of malice, nor may good faith on the part of the defendant or the absence of malice be considered by you in mitigation of damages.

33 Am. Juris. §272 P. 256

Wigmore on Evidence §74, 90 ALR 1169

[162]

Instruction No. 15

In estimating the amount of plaintiff's actual or compensatory damages, if you believe from the evidence that the plaintiff has been damaged by the defamatory matter complained of in this case, you may take into consideration the extent of the circulation given to this libel, that is to say, the number of people to whom it was exhibited or accessible and to whom it was visible. You may take into consideration the grief, anguish, mental suffering, mortification and humiliation which the plaintiff has undergone and suffered by reason of the defamatory matter. In this connection you may consider the mental suffering sustained by plaintiff by reason of his wife and children due to the defamatory matter complained of, not as to the effect of the defamatory matter upon them, but as to the effect upon him. If you believe from the evidence that his good name and reputation were injured and that he did suffer grief, anguish, mental suffering, mortification or humiliation, then you may award the plaintiff such compensatory or actual damages as you find from

the evidence plaintiff has suffered, or that it is reasonably certain he will suffer in the future by reason of said publication, not exceeding the amount prayed for in the complaint, to wit: $50,000.00.

[Endorsed]: Filed June 22, 1943. [163]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above Entitled Case, find for the Defendant.

D. D. HAWORTH,
Foreman.

[Endorsed]: Filed. June 22, 1943. [165]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 296

MARVIN S. NICHOLS,

Plaintiff,

vs.

J. J. NEWBERRY COMPANY,

Defendant.

JUDGMENT

This cause came regularly on for trial June 21st, 1943, before the Court and a jury, plaintiff appearing in person and by his attorney, Bernard L. Swer-

land, the defendant appearing by Edge, Davenport, Keith & dePender, its attorneys; and the Court having heard the evidence in said cause, instructed the jury and submitted the case to the jury for its consideration, and the jury thereafter returned into court and returned a verdict in favor of the defendant,

Now, Therefore, upon motion of the defendant for judgment in accordance with the verdict of the jury, and the Court being fully advised in the law in the premises,

It Is Ordered, Adjudged and Decreed That plaintiff take nothing by this action, and judgment is hereby entered in favor of the defendant and against the plaintiff, and for its costs and disbursements herein, to be taxed at $68.20.

Approved, Clerk is directed to enter.

Done in Open Court this 28 day of June, 1943.

L. B. SCHWELLENBACH
Judge.

Notice of Presentment waived and approved as to form. Copy received Jun 25 1943.

BERNARD L. SWERLAND
Attorney for Plff.
Presented by Lester Edge

[Endorsed]: Filed. June 28, 1943. [166]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED THEREON AND TO ENTER JUDGMENT IN FAVOR OF PLAINTIFF

Comes now the above named plaintiff and moves the Court to set aside the verdict of the jury rendered herein, and the judgment entered thereon in favor of the defendant and against the plaintiff, and to enter judgment for the plaintiff notwithstanding the said verdict.

This motion is based on the records and files herein and upon the following grounds herein:

I.

That the said verdict for the defendant is contrary to law.

II.

That the said verdict for the defendant is contrary to the evidence and there is no evidence or reasonable inference from the evidence to justify the verdict.

III.

That the said verdict is contrary to the law and the evidence.

IV.

That the court erred in failing to hold that under the evidence defendant had no privilege, as a matter of law.

BERNARD L. SWERLAND
Attorney for Plaintiff

Copy Received this 2nd day of July, 194...
EDGE, DAVENPORT, KEITY
& dePENDER
Attorney for Defendant.

[Endorsed]: Filed July 2, 1943. [167]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

In the event that the motion of plaintiff to set aside the verdict and judgment entered thereon in favor of defendant and to enter judgment notwithstanding said verdict in favor of plaintiff is denied, but not other wise, plaintiff herein moves the Court for an order granting him a new trial.

This motion is based upon the pleadings and papers on file in the above entitled action and upon the minutes of the Court, and for the following causes and upon the following grounds materially effecting the substantial rights of plaintiff:

I. That there is no evidence or reasonable inference from the evidence to justify the verdict in favor of the defendant, and that the verdict for the defendant is contrary to law.

II. That there is no evidence or reasonable inference from the evidence to sustain defendant's alleged affirmative defense of privilege, and that the verdict for the defendant is contrary to law.

III. Error in law occurring at the trial due to the Court refusing to hold, as a matter of law, that the defendant had no privilege.

IV. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 3.

V. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 4.

VI. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 5.

[168]

VII. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 8.

VIII. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 9.

IX. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 11.

X. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 13.

XI. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 14.

BERNARD L. SWERLAND
Attorney for Plaintiff.

Copy received this 2nd day of July, 194...
EDGE, DAVENPORT, KEITH & de PENDER
Attorney for Defendant

[Endorsed]: Filed July 2, 1943. [169]

(Copy)

October 7, 1943

Lester Edge, Esquire
Paulsen Building
Bernard Swerland, Esquire
Old National Bank Building

Re: Nichols v. The Newberry Co.
Civ. 296

Gentlemen:

The motion for new trial is denied. The problem involved in this action is discussed on pages 12 to 17 inclusive of my opinion in Holden v. American News Company, filed this day. I am convinced that the distinction therein made covers the problem presented by the motion in this case.

Yours truly,

L. B. SCHWELLENBACH

LBS/em [170]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 323

ASHLEY HOLDEN,

Plaintiff,

v.

AMERICAN NEWS COMPANY, and C. A. HAWKSLEY,

Defendants.

OPINION OF THE COURT

Edge, Davenport, Keith & dePender,
Spokane, Washington

John T. Raftis,
Colville, Washington
Attorneys for Plaintiff.

Thomas A. E. Lally,
Spokane, Washington
Attorney for Defendants.

Schwellenbach,
District Judge.

* * * * * * *

The most troublesome problem in this case is raised by defendants' contention that plaintiff's failure to prove malice in the publication of this article by these defendants requires the dismissal of this action. Where no question of privilege is involved, [171] the proof of malice is unnecessary. Wilson v. Sun Publishing Company, 85 Wash. 503,

515; McKillip v. Grays Harbor Publishing Company, 100 Wash. 657; Hollenbeck v. Post-Intelligencer Company, 162 Wash. 14, 18; Ziebell v. Lumbermens Printing Company, 14 Wash. (2d) 261, 266. However, each defendant pleaded affirmatively that the plaintiff and Albi "placed themselves in the public eye and made themselves and their acts the objects for fair editorial comment and criticism and that the article involved is composed of facts, background and fair editorial criticism." In Fahey v. Shafer, 98 Wash. 517, 522, the State Supreme Court said: "In this state malice is not ordinarily an essential element in a civil action for damages for libel or slander * * *. But this is not true in cases involving the qualified privilege. In such cases, actual malice must be proved before there can be a recovery. This follows from the very nature of the privilege, which in itself is a complete defense in the absence of malice. The burden in such cases is upon the plaintiff to prove the existence of malice. * * * Whether a statement, if made in good faith and without malice, is privileged is a question for the court. But if there is any evidence reasonably tending to show actual malice, the plaintiff has the right, notwithstanding the privileged character of the communication, to have the question of malicious excess of privilege submitted to the jury upon such evidence. * * * Where the qualified privilege exists and the court can see that the language used will warrant no inference of malice, and there is no other proof of malice, it is the duty of the court to grant a non-

suit." This doctrine was affirmed in the later case of Ecuyer v. New York Life Insurance Company, 101 Wash. 247, 256, with the restrictions that "whether bona fides existed in the statement made or whether it was malicious is usually a question of fact for the jury * * *. This the jury must determine from the language itself and the surrounding circumstances." The difficulty in the problem evolves from the use in Graham v. Star Pub. Co., 133 Wash. 387, of this language: "The privilege ends when falsity begins and if, as the complaint alleges, the charge is false, the privilege, if there was one, was, therefore, exceeded." It takes but casual analysis [172] to appreciate the sharp conflict between these two holdings. In Washington, the doctrine that truth constitutes a complete defense has been recognized since Haynes v. The Spokane Chronicle Publishing Company, 11 Wash. 503. Since truth is a complete defense, resort to the defense of privilege only becomes necessary when falsity is involved. It necessarily follows, therefore, that if Graham v. The Star Pub. Co., supra, correctly states the rule, the defense of qualified privilege is, for all practical purposes, abolished in this state. The language of Graham v. Star Pub. Co., supra, is broad enough to justify the conclusion that the rule applies to absolute privilege as well. This conflict between the two rules makes necessary an examination of later cases. There only are three cases in which the question arose. In Hollenbeck v. Post-Intelligencer Company, 162 Wash. 14, 19, the Star Publishing Company case

was cited and the language "the privilege ends when falsity begins" was repeated. In Miles v. Louis Wasmer, Inc., 172 Wash. 466, 469, both cases are cited and both rules are stated and the court used the following language: "Defamatory words spoken of a person, which in themselves prejudice him in his profession, trade, vocation or office, are slanderous and actionable *per se* unless they are held *true or privileged.* 36 C. J. 1165; Ecuyer v. New York Life Insurance Company, 101 Wash. 247, 172 Pac. 359." (Emphasis mine.) In the very next paragraph, the following language is used: "Words spoken, however, which are not in fact true, are not privileged, because, as stated in Graham v. Star Pub. Co., 133 Wash. 387, 233 Pac. 625, 'The privilege ends when falsity begins, and, if, as the complaint alleges, the charge is false, the privilege, if there was one, was therefore exceeded.'" However, between the apparently irreconcilable language just quoted, the following appears: "Words spoken concerning matters of public interest, such as matters concerning the administration of government, matters relating to the management of public institutions and local authorities and matters pertaining to the administration of public justice, are within the rule of qualified privilege, *if true.*" (Emphasis mine.) In Fahey [173] v. Shafer, supra, and Ecuyer v. New York Life Insurance Company, supra, the privilege claimed was that defined by Newell, Slander and Libel, 2d ed. p. 391, as concerning a communication "made touching a matter in which the party making it has an interest to an-

other having a corresponding interest." In the Fahey case, the parties were business rivals and the statements involved were made to the Seattle Ad Club and to certain wholesale clothing manufacturers. In the Ecuyer case, the statements were made concerning plaintiff's alleged defalcations to the plaintiff's father and to individuals and firms with whom plaintiff had made application for employment. On the other hand, the publication involved in Graham v. Star Publishing Company concerned the official conduct of the plaintiff who was a member of the Seattle Police Department. The broadcast involved in Miles v. Wasmer, Inc., supra, was by a radio commentator who was discussing the question of prohibition. In the opinion of Hollenbeck v. Post-Intelligencer Company, supra, the court did not reach the question as to whether privilege actually was involved. The case was considered by the Supreme Court on the basis of the demurrer which had been sustained by the trial court to the plaintiff's complaint.

From the foregoing, it is possible to reconcile the apparently irreconcilable positions taken by the Washington court; this, despite the fact that that court itself has never attempted so to do. In those cases arising out of communications where the privilege claimed is based upon the fact that the communication is "made touching a matter in which the party making it has an interest to another having a corresponding interest", the falsity of what is spoken or written does not destroy the qualified priv-

ilege in the absence of malice. In those cases, the rule enunciated in Ecuyer v. New York Life Insurance Company, supra, controls. In cases where the words spoken or written concern "matters of public interest, such as matters concerning the administration of Government, matters relating to the [174] management of public institutions and local authorities and matters pertaining to the administration of public justice", the helping hand of the qualified privilege is only given to those whose words or writings are true. In those instances, the rules in Graham v. Star Pub. Co., supra, and Miles v. Louis Wasmer, Inc., supra, control. Since the defendants here seek the protection of the latter type of privilege, the issue of malice was not involved in this case. The jury found the article to be false. Consequently, whether malice existed was immaterial.

Such a distinction is required if there is to be any recognition of the defense of privilege in the law of Washington. If the language of Graham v. Star Pub. Co., supra, is taken literally, no one in this state would dare even to report court proceedings or the activities of any legislative body. The phrase, "The privilege ends when falsity begins" is attractive but dangerous because of its very attractiveness. It is, as Mr. Justice Frankfurter said in Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, "an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; * * * and repetition soon establishes it as a legal formula,

undiscriminatingly used to express difficult and sometimes contradictory ideas." This construction and distinction is in line with the rule in the great majority of states. See Note 110 A. L. R. 412. The reason for the distinction is best outlined by Judge (later Mr. Justice) Holmes in Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, as follows:

> "But there is an important distinction to be noticed between the so called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case, a bona fide statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are [175] not true. The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests, both intrinsically meritorious. When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating

facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer."

The same distinction was made by Chief Justice Taft when he was a Circuit Judge and wrote the opinion in Post Publishing Co. v. Hallam, 59 F. 530. He said:

"The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be de-

rived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of society. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good." [176]

[Title of District Court and Cause.]

ORDER ON MOTION TO SET ASIDE VERDICT AND FOR JUDGMENT FOR PLAINTIFF N.O.V. AND MOTION FOR A NEW TRIAL

The above matter came on for hearing on the motion of plaintiff to set aside the verdict and judgment and entered thereon and to enter judgment in favor of plaintiff and on motion of plaintiff for a new trial.

The Court heard said motions and argument thereon and being fully advised in the premises,

It Is Ordered that said motion to set aside verdict and judgment entered thereon and to enter judgment in favor of the plaintiff be and the same is hereby denied, and the motion of plaintiff for a new trial be and the same is hereby denied.

Plaintiff excepts, exception allowed.

Done in Open Court this 19 day of October, 1943.

L. B. SCHWELLENBACH,
Judge.

Copy received and notice of presentation waived this 18 day of October, 1943.

BERNARD L. SWERLAND,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 19, 1943. [177]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To J. J. Newberry Company, defendant above named, and to Edge, Keith and DePender, your attorneys of record:

Notice is hereby given that Marvin S. Nichols, plaintiff in the above entitled action hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action, which said judgment was entered by the Court and filed therein on June 28, 1943, and from the order denying plaintiff's motion to set aside the verdict and enter judgment for the plaintiff non obstante verdicto, and motion for new trial which said order was entered on October 19, 1943.

Dated this 24th day of December, 1943.

BERNARD L. SWERLAND,
Attorney for Plaintiff and Appellant, Marvin S. Nichols.
Address: 1208 Old National Bank Bldg.,
Spokane, Washington.

Copy of the above Notice mailed to Lester P. Edge, December 24th, 1943.

A. A. LaFRAMBOISE,
Clerk, United States District Court, Eastern District of Washington.

[Endorsed]: Filed Dec. 24, 1943. [178]

United States Fidelity and Guaranty Company
Baltimore, Maryland

No. 76 706 $250.00

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents, That we, Marvin S. Nichols, an individual, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto J. J. Newberry Company, a corporation, the defendant above named in the just and full sum of Two Hundred Fifty and No/100ths Dollars ($250.00) good and lawful money of the United States of America, well and truly to be paid, and for the true payment of which we hereby bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Witness our hands and seals this 24th day of December, A. D. 1943.

The Condition of the Above Obligation Is Such That, Whereas the above named Marvin S. Nichols, Plaintiff, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of June 28, 1943, in favor of the defendant and against the plaintiff for costs in the amount of Sixty-Eight and 20/100ths Dollars ($68.20); and from the order denying motion to set aside verdict and to enter judgment for plaintiff n.o.v. and deny-

ing motion for new trial, dated October 19, 1943; and

Whereas, the above named principal has heretofore given due and proper notice that he will appeal from said judgment and orders of the District Court of the United States for the Eastern District of Wasihngton, [179] Northern Division;

Now, if the said principal shall pay to J. J. Newberry Company, the defendant above named, all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding Two Hundred Fifty and No/100ths Dollars ($250.00), then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

MARVIN S. NICHOLS,
Principal,

[Seal] UNITED STATES FIDELITY AN'D GUARANTY COMPANY,

By M. FREELAND,
Attorney-in-Fact.

From the Office of
Old National Insurance Agency, Inc.
1124 Old National Bldg.
Spokane.

[Endorsed]: Filed Dec. 24, 1943. [180]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL UPON WHICH APPELLANT INTENDS TO RELY UPON THE APPEAL

Comes now Marvin S. Nichols by his Attorney, Bernard L. Swerland, and makes the following Statement of Points upon which he intends to rely in the appeal from the judgment entered in the above-entitled action:

1. That the said verdict for the defendant is contrary to law.

2. That the said verdict for the defendant is contrary to the evidence and there is no evidence or reasonable inference from the evidence to justify the verdict.

3. That the said verdict is contrary to the law and the evidence.

4. That the court erred in failing to hold that under the evidence defendant had no privilege, as a matter of law.

5. That there is no evidence or reasonable inference from the evidence to justify the verdict in favor of the defendant, and that the verdict for the defendant is contrary to law.

6. That there is no evidence or reasonable inference from the evidence to sustain defendant's alleged affirmative defense of privilege, and that the verdict for the defendant is contrary to law.

7. Error in law occurring at the trial due to the Court refusing to hold, as a matter of law, that the defendant had no privilege.

8. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 3.

9. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 4. [181]

10. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 5.

11. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 8.

12. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 9.

13. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 11.

14. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 13.

15. Error in law occurring at the trial in refusing to give plaintiff's requested Instruction No. 14.

16. Error in law occurring at the trial due to the Court holding and instructing the jury that plaintiff was required to prove malice on the part of defendant in order to recover.

BERNARD L. SWERLAND,
Attorney for plaintiff and appellant.
1208 Old National Bank Bldg.
Spokane, Washington.

Copy received December 27, 1943.
EDGE, DAVENPORT, KEITH & dePENDER,
Attorneys for defendant-appellee.

[Endorsed]: Filed Dec. 27, 1943. [182]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

Comes now the above named plaintiff and respectfully moves the Court for an Order extending the time for filing the record on appeal and docketing the action.

This Motion is based upon the records and files herein, the notice of appeal dated December 24, 1943, and the affidavit of Bernard L. Swerland, annexed hereto.

BERNARD L. SWERLAND,
Attorney for Plaintiff.

State of Washington,
County of Spokane—ss.

Bernard L. Swerland, having been first duly sworn deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that heretofore and on the 24th day of December, 1943, a Notice of Appeal was served and filed in the United States District Court, Eastern District of Washington, appealing to the Circuit Court of Appeals, Ninth Circuit, from the final judgment entered in this action; that promptly thereafter affiant directed Mrs. J. J. Cole, the reporter who transcribed the testimony at the trial of this action, to prepare the minutes thereof. Deponent has been informed, however, that due to the fact that the said Mrs. Cole was engaged in transcribing the testimony of prior actions and the

recent death of an immediate member of her family she has been unable [183] to complete the transcription of the testimony of the trial in the above entitled action.

Deponent respectfully submits that the period of forty days from the date of the Notice of Appeal expires February 2nd, 1944, by which time the record on appeal in the above entitled matter is required to be filed in the office of the Clerk of the Circuit Court of Appeal, located in San Francisco, California.

Deponent respectfully prays therefore that the Court extend the time for the filing of the record on appeal and the docketing of said action to the 23rd day of March, 1944. That the within application has been made prior to the expiration of the forty days from the date of the notice of appeal, for all of which no previous application has been made.

BERNARD L. SWERLAND.

Subscribed and sworn to before me this 25th day of January, 1944.

[Seal] THOS. MALOTT,
Notary Public in and for the State of Washington, residing at Spokane.

[Endorsed]: Filed Jan. 27, 1944. [184]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL

Plaintiff having filed his motion praying for an Order extending the time for filing the record on appeal and docketing the action, and the said motion having come on regularly for hearing before the Court, and the Court being fully advised in the premises, and due deliberation having been had;

It Is By the Court Ordered:

That the time for filing the record on appeal and docketing the action shall be, and the same hereby is, extended to the 23rd day of March, 1944.

Done in Open Court this 27th day of January, 1944.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by
BERNARD L. SWERLAND,
Attorney for Plaintiff.

Copy received and the foregoing Order is consented to.

EDGE, DAVENPORT, KEITH & dePENDER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 27, 1944. [185]

[Title of District Court and Cause.]

APPLICATION FOR TRANSMISSION OF ORIGINAL EXHIBIT TO THE CIRCUIT COURT OF APPEALS

Comes now the plaintiff above named and moves the Court for an order providing for the safekeeping and transmission of the original exhibit listed below to the Circuit Court of Appeals for the Ninth Circuit on the ground that said exhibit cannot be conveniently or satisfactorily copied into the record and should be inspected by the Appellate Court.

This Motion is based on the files herein. The original exhibit referred to is:

Plaintiff's Exhibit "A".

BERNARD L. SWERLAND,
Attorney for Plaintiff.

Copy Received this 6th day of March, 1944.
LESTER EDGE,
Attorney for defendant.

[Endorsed]: Filed March 8, 1944. [186]

[Title of District Court and Cause.]

ORDER PROVIDING FOR TRANSMISSION OF ORIGINAL EXHIBIT TO THE CIRCUIT COURT OF APPEALS

This matter coming regularly on for hearing upon motion of the plaintiff for an order to transmit a certain exhibit to the Circuit Court of Appeals, and

it appearing to the Court that said exhibit cannot be conveniently or satisfactorily copied into the record and that the same should be inspected by the Appellate Court; now, therefore, it is

Ordered that the Clerk of this Court transmit the following original Exhibit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit as and when he transmits the transcript of the record on appeal herein. The original exhibit referred to is:

Plaintiff's Exhibit "A".

Done in open Court this 8th day of March, 1944.

L. B. SCHWELLENBACH,
District Judge.

Presented by
Bernard L. Swerland.

Copy received and foregoing Order is consented to.

LESTER EDGE,
Attorney for defendant.

[Endorsed]: Filed March 8, 1944. [187]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

Come now the parties above named, Marvin S. Nichols, plaintiff, by his attorney, Bernard L. Swerland, and the defendant, J. J. Newberry Company, a corporation, by its attorneys, Edge, Davenport, Keith & dePender, and hereby agree and stipulate

that the following parts of the record, proceedings and evidence shall be and are designated to be included in the record on appeal:

1. Plaintiff's amended complaint.
2. Defendant's answer to plaintiff's amended complaint.
3. Notice of defendant's trial amendment to answer.
4. Reporter's transcript of all testimony, evidence and proceedings at the trial, including rulings of the court on the admission and exclusion of testimony.
5. Plaintiff's requested instructions.
6. Jury's verdict.
7. Judgment on verdict.
8. Memorandum of costs and disbursements.
9. Plaintiff's motion to set aside verdict and judgment entered thereon and to enter judgment in favor of plaintiff.
10. Plaintiff's motion for new trial.
11. Order on motion to set aside verdict and judgment for plaintiff N.O.V. and motion for new trial.
12. Memorandum opinion of the trial court, consisting of letter of [188] judge of the trial court, addressed to respective counsel, dated October 7, 1943, and pages 12 to 17 of opinion of Honorable Lewis B. Schwellenbach, Judge of the United States District Court for the Eastern District of Washington, entered and filed in that certain cause entitled Ashley Holden v. American News Company, et al., being cause No. 323 of the files of the Clerk of the

United States District Court for the Eastern District of Washington, to which said pages reference is made in the letter of the district Judge addressed to counsel, denying motion for new trial.

13. Notice of appeal.

14. Bond on appeal.

15. Stipulation designating matters to be included in the record.

16. Statement by appellant of the points on which he intends to rely.

17. Application to relieve parties from printing said exhibits in the record.

18. Order relieving parties from printing certain exhibits in the record.

19. Motion to extend time to file record on appeal.

20. Order extending time to file record on appeal.

21. Motion to amend amended complaint and record as to citizenship of plaintiff.

22. Order on motion to amend amended complaint and record as to citizenship of plaintiff.

Dated at Spokane, Washington, this 14th day of March, 1944.

BERNARD L. SWERLAND,
Attorney for Plaintiff.
EDGE, DAVENPORT, KEITH & dePENDER,
By LESTER P. EDGE,
Attorneys for Defendant.

[Endorsed]: Filed March 14, 1944. [189]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
Eastern District of Washington—ss

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern Division of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 189 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals as called for by the Stipulation as to Record, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on appeal of Marvin S. Nichols from the final judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California.

I further certify that in accordance with order of the Court I herewith transmit Plaintiff's Original Exhibit "A".

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing record amount to $21.45 and that the same has been paid in full by Bernard L. Swerland, Attorney for the Appellants. [190]

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid District Court, this 18th day of March, A. D. 1944.

[Seal] A. A. LaFRAMBOISE,
Clerk, United States District Court, Eastern District of Washington. [191]

[Endorsed]: No. 10709. United States Circuit Court of Appeals for the Ninth Circuit. Marvin S. Nichols, Appellant, vs. J. J. Newberry Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed March 21, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10709

MARVIN S. NICHOLS,

Appellant,

v.

J. J. NEWBERRY COMPANY, a corporation,

Appellee.

STATEMENT OF POINTS AND DESIGNATION

Comes now the appellant above named and hereby formally adopts as his statement of points on which he intends to rely in the Appellate Court, the statement of points as filed in the trial court, said statement being included in the transcript as prepared by the clerk of the trial court and forwarded to the clerk of this court. Appellant likewise designates all rulings of the court made upon matters which occurred during the trial to which exception was noted by appellant and allowed by the court.

In support of the said points on which appellant intends to rely, the appellant designates that portion of the record to be printed which is designated in the "Stipulation as to Record" on file herein and excepts the following original exhibit, viz: Appellant's Exhibit "A" which said exhibit has been transmitted to this court in its original form and as to which exhibit appellant has made application to

the court for relief from printing the same in the record.

BERNARD L. SWERLAND,
Attorney for Appellant.

Service of the within statement of points and designation is hereby admitted by receipt of a true copy this 14th day of March, 1944.

EDGE, DAVENPORT, KEITH & dePENDER,
By LESTER EDGE,
Attorneys for Appellee.

[Endorsed]: Filed March 21, 1944. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

ORDER RELIEVING PARTIES FROM PRINTING CERTAIN EXHIBITS IN THE RECORD

It appearing from the files and records on file herein that appellant's Exhibit "A" cannot readily or satisfactorily be printed or reproduced in the printed record on appeal; now, therefore, it is

Ordered that said exhibit be omitted from the printed record.

It Is Further Ordered that said exhibit shall be considered by the Court in its original form as though set out in the printed record.

Dated this 21st day of March, 1944.

FRANCIS A. GARRECHT,
United States Circuit Judge.

O. K. as form.

LESTER EDGE,
Atty. for Appellee.

[Endorsed]: Filed March 21, 1944. Paul P. O'Brien, Clerk.